UNITED STAES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ANDRONACO, INC., d/b/a ANDRONACO INDUSTRIES,

Respondent

Case 07-CA-160286

and

LINDSEY JOHNSTON, an Individual,

Charging Party

_____/

RESPONDENT'S POST-HEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. INTRODUCTION

The Complaint in this case alleges three categories of violation. The first is that the Charging Party, Lindsey Johnston, was discharged for engaging in "concerted activities ... by discussing the wages, hours, and working conditions of Respondent's employees." In fact, there was no evidence presented at the trial to even remotely suggest that Ms. Johnston engaged in any such activity. What the evidence does show is that Ms. Johnston was discharged because of performance issues over a lengthy period of time.

The second category is alleged coercive interrogation by supervisors Richard Vining, and an accusation of disloyalty by Kaila Hicks.[1] These allegations were never the subject of any unfair labor practice charge. In fact, there was no evidence introduced at the trial from which it could be concluded that there was any coercive interrogation, and the disloyalty comment had nothing to do with protected activity.

Finally, the last category is that certain provisions of the Company's handbook are alleged to interfere and restrain employees in the exercise of their Section 7 rights. In fact, the provisions at issue are not intended to and do not impact on Section 7 of rights. They only regulate and prohibit conduct which the Company is entitled to regulate and prohibit.

II. STATEMENT OF FACTS

A. Discharge of Lindsey Johnston

1. The Nathaniel Barrett Connection

One of the things made clear at the trial was that Ms. Johnston never discussed anyone's wages with anyone else, never engaged in any Section 7 activity, and that no member of management thought she did. Thus, the General Counsel tries to piece together a legal theory by starting with another former employee, Nathaniel Barrett

[1] The Complaint identifies her as Kaila Schweda. She has since married and her name is now Kaila Hicks.

Mr. Barrett had worked for the Company in the IT Department doing graphic design. (Tr. 28.) On May 15, 2015, Mr. Barrett submitted his written resignation, which stated his intention that his employment would end two weeks later on May 29, 2015. (Tr. 32, GC-3)

On May 25, 2015, the day before his intended last day, Mr. Barrett had a conversation with Scott Cascaden, an Andronaco production employee (Tr. 33). That conversation was, in part, about wages. Here is Mr. Barrett's description of that conversation:

> A. We just talked about how much we had heard some people made and how -- he told me how much he made and how he was hoping to make more and all that stuff, you know.

(Tr. 33.)

Mr. Barrett characterized this as "water cooler talk." (*Id.*) After this conversation, Mr. Cascaden sought out Mr. Andronaco, the Company's CEO, and reported to him that Mr. Barrett had been discussing wage information of Mr. Andronaco, Ms. Hicks, and Mr. Cascaden himself. (Tr. 179.)

Mr. Andronaco then called Mr. Barrett to his office. Mr. Andronaco and Mr. Barrett both agree that Mr. Andronaco's concern was not that anyone's wage information may have been shared, but rather that secured portions of the Company's computer system, which contained highly confidential information, may have been improperly accessed. As Mr. Andronaco testified, if Mr. Barrett was truly knowledgeable about employee wage information, the most likely way that he would have obtained that information was that if he or someone else had improperly accessed it on the Company's computer system. (Tr. 179-80.) To gain such access a person would have to know the administrative password, and anyone who had the administrative password would have access to all the information stored on the Company's system, including highly confidential information:

Q. All right. So if, in fact, Mr. Barrett, as you were concerned about at that point, had the administrative password, what kind of information would that give him access to?

A. He could get into Social Security numbers. He could get into bank information. He could get into my computer which has acquisition information on it, companies that we're looking to acquire. He could get into health information, you know, and I was concerned for all our employees, including Lindsey's, that what information he had.

(Tr. 180-81.)

Mr. Barrett confirmed that Mr. Andronaco's concern was that someone had improperly accessed the computer system.

Q. And what he was talking about is if he thought you had accessed part of the system that you weren't supposed to access, he would take legal action against you, right?

A. Um-hmm, yeah, yeah.

Q. So the reason he was going to take action against Mr. Kyle -- at least what he was telling you was because he got into a part of our computer system that he didn't have a right to get into.

A. Yeah.

(Tr. 51.)

For the next several weeks the Company asked for Mr. Barrett's cooperation in determining the extent of the security breach. (Tr. 182.) Mr. Barrett declined to cooperate. (Tr. 38). In light of Mr. Barrett's lack of cooperation, and to protect its interest in its confidential information, the Company filed a lawsuit against Mr. Barrett in the Kent County Circuit Court. That complaint was filed on August 7, 2015. (Tr. 183, GC-7.) What is critical to this case was that in connection to the settlement of that case Mr. Barrett gave an affidavit in which he affirmed that the only confidential information he had been privy to was certain unverified wage

information, and that the only people he had discussed that information with were a former employee by the name of Kyle Eadie, Mr. Cascaden, the National Labor Relations Board, and Mr. Barrett's lawyer. (Tr. 58, GC-9.) At the trial, Mr. Barrett confirmed that the affidavit was accurate in this and every other respect, and that he would not have signed it if it was not. (Tr. 63.) Thus, Mr. Barrett confirms that he did not have any discussions about wages with Ms. Johnston.

There is not one piece of evidence to suggest that Mr. Barrett engaged in any conversation with Ms. Johnston about wages or any other confidential information. Mr. Barrett's testimony on this point is that he did not engage in any such conversation with Ms. Johnston and that testimony is undisputed.

Not surprisingly, then, there is no evidence to suggest that anyone in management thought that Ms. Johnston was involved in this episode at all.

2. Robert Zurita

Mr. Zurita was a press operator. (Tr. 65.) According to the General Counsel, his testimony was offered to show "a coordinated effort to go after individuals who were associated with Mr. Barrett." (Tr. 69.) But what is clear from his testimony is that no one ever went after Mr. Zurita. He quit his job.

Mr. Zurita learned about the Company's lawsuit against Mr. Barrett, and was upset with that information. He raised the issue with his supervisor, Tony Hinerman. (Tr. 67.) He told Mr. Hinerman that he did not think he could work for a Company that was suing his friend. (Tr. 172.) Mr. Hinerman did not know what was going on with Mr. Barrett, and so brought Mr. Zurita's concerns to the attention of Mr. Andronaco. (*Id.*) Mr. Andronaco and Mr. Hinerman went back to Mr. Zurita's work area to talk to him about the situation and try to convince him to

continue working for Andronaco. (Tr. 172-73.) Mr. Zurita said two times during this conversation that he could not work for a Company that was suing his friend. (Tr. 73.) The next day he went to Human Resources, filled out the paperwork for leaving employment and never showed up to work again. (Tr. 70.) Initially, in his testimony, there was some suggestion that when Mr. Zurita went to the Human Resources Department, he only intended to give a two-weeks' notice, but somehow was forced to quit on the spot. However, Mr. Zurita cleared up the confusion about that himself. Here is what he said:

> A. I basically came in there, and I sat down, and then she gave me a paper that said what I need to know when I leave the Company, and they basically told me -- like I said, this is the way I felt. I just didn't want to drag it out, and just go ahead and terminate me that day.

(Tr. 70.)

Thus, according to Mr. Zurita, he did intend to give his two weeks' notice, but as he sat in the Human Resources office, he decided to end it then.

Mr. Hinerman understood that Mr. Zurita had quit his job. (Tr. 174.) Mr. Andronaco understood that Mr. Zurita had quit his job. (Tr. 184.) In fact, Mr. Zurita agrees that based on what he had said it was perfectly reasonable for Mr. Andronaco and other members of management to conclude that he was quitting his job.

> Q. BY MR. RYAN: "I said fine, that I was planning to submit my 2 weeks' notice anyway the next day." That's what you wrote on this affidavit?
>
> A. Yes.
>
> Q. So were you or weren't you planning on submitting your 2-week notice?
>
> A. I was, but at the conversation I had with Ron Andronaco, I was not. I hadn't made up my mind then.

Q. You had made up your mind shortly after the conversation with Mr. Andronaco that you were going to submit your 2 weeks' notice.

A. It was following, the next day, yes.

Q. And the reason is because Andronaco was suing your friend.

A. Yes.

Q. And you told Mr. Andronaco twice during that conversation, I don't think I can work here if you're suing my friend.

A. Yeah.

Q. Do you see how maybe Mr. Andronaco or the Company might have gotten the impression that you were going to quit?

A. Yeah, I can see that.

Q. And, in fact, if that's the impression they got, they would have been right, because you were going to quit, right?

A. Yes.

(Tr. 73-4.)

3. Lindsey Johnston

The Complaint alleges at paragraph 6 that the Company discharge Lindsey Johnston because:

> "About the months of May, June and July 2015 [she] engaged in concerted activity with other employees for the purpose of mutual aid and protection by discussing the wages, hours and working conditions of Respondent's employees."

There is no evidence in the record that Ms. Johnston engaged in any concerted activity, that she discussed wages, hours or working conditions with any other employees, or that anyone in management thought she did. There is a wealth of evidence in the record which shows that a

pattern of performance issues over the lengthy period of time was the reason Ms. Hicks made the decision to terminate Ms. Johnston's employment.

Ms. Johnston was employed by the Company as its receptionist. (Tr. 89.) She was stationed at the entryway to the Company's office. (*Id.*) Her job included greeting visitors, doing data entry, typing, and ordering office supplies. (Tr. 89-90.) She had a computer at her desk. (Tr. 90.) Her supervisor was Kaila Hicks. (*Id.*) Ms. Hicks had significant concerns about Ms. Johnston's performance. She began documenting those many months before the discharge. (Tr. 150.) A major concern was Ms. Johnston's poor attendance. (Tr. 137.) The first documented evidence of this in the record is Respondent's Exhibit 1 which is an e-mail dated July 8, 2014 placed in Ms. Johnston's file. The e-mail evidenced a meeting Ms. Hicks' and the Company's CFO, Scott Palmitier, had with Ms. Johnston to address her attendance problems. It followed an absence over the 4th of July in 2014. The purpose of the meeting was to reiterate to Ms. Johnston how important her attendance was and to ask her to "make it a priority." The e-mail states that the meeting was not to tell Lindsey that "it is her last straw." In fact, it was not the last straw. There were several more straws to come before the last one.

Ms. Johnston's poor attendance was also addressed in the performance review she received in February 2015. (Tr. 97, R-5.) On this review, she was given "poor" marks in reliability and willingness to take on additional responsibilities. She acknowledges the reliability issue was directly attributable to her poor attendance, and that her attendance was, in fact, poor. (Tr. 97.)

Attendance was always a problem for Ms. Johnston. The Company has a point-based attendance program. (Tr. 135-37.) For every month of perfect attendance, an employee gets two positive points, and when an employee has an absence not covered by vacation, paid personal

time, or approved leave, they get a negative point. (*Id.*) Ms. Johnston admitted that she had poor attendance and that she was always, or almost always in a negative situation. (Tr. 97.)

By the beginning of 2015, Ms. Hicks was so concerned about Ms. Johnston's performance issues that she started to keep a running log of those problems. (Tr. 139.) That log was admitted as Respondent's Exhibit 6.

The first entry on the log is dated January 6, and documents that Ms. Johnston failed to punch out for the day as she was required to do. (Tr. 140.) Like attendance, this was a recurring theme during Ms. Johnston's time with the Company. This is evidenced by the formal written warning she was given on January 7, 2015 (R-2).

The second entry on Ms. Hicks' log is dated April 13. On that date, Ms. Johnston was running late for work. (Tr. 101.) Thus, punching in late would, of course, mean another negative point under the attendance policy. (*Id.*) So to avoid the negative point, Ms. Johnston pulled up to the entry to the building, entered and punched her time card, and went back out to her car, drove her car to the parking area, parked it and then entered the building and went to work. (*Id.*) Collin Cruttenden, the plant manager, observed this and reported it to Ms. Hicks. (Tr. 141.) Even Ms. Johnston acknowledges that she should most have done this and that it was "bad judgment." (Tr. 101.)

The next entry on Ms. Hicks' log is dated May 1, 2015. On that date, Ms. Johnston spent about a half-hour talking to a former employee, Tom Dettman, in the Company's lobby. (Tr. 124-25.) Ms. Johnston had hired Mr. Dettman to do the video of her wedding. He was apparently there to talk about the wedding video at least that is what he told Collin Cruttenden. (Tr. 128.) Remember, Ms. Johnston tried to claim that Mr. Dettman was there to see Mr. Cruttenden, not her. However, Mr. Cruttenden had no appointment with Mr. Dettman, and they

exchanged pleasantries for about one minute. (*Id.*) It was Mr. Cruttenden who noticed the inordinately long time Mr. Dettman spent talking to Ms. Johnston while she was supposed to be working. (Tr. 127.)

Similarly, on July 23, 2015, Ms. Hicks observed that Ms. Johnston spent another 30 minutes or more socializing with her sister-in-law in the reception area. (Tr. 103-04, and 145.) On July 28, 2015, Ms. Hicks addressed the issues with the two visitors and she also addressed Ms. Johnston's working unapproved overtime. (Tr. 140.)

The final item on Ms. Hicks' log was as follows:

> "Wednesday, August 12 – spent all day on a long MS Word document … ??"

That document was admitted as Respondent's Exhibit 7. It is a 4-page, singled-spaced Word document. It is a letter from Ms. Johnston to Weddington Way, and the topic is her bridesmaids' dresses. There are a number of things about this document that are undisputed: (1) it is personal, (2) Ms. Johnston worked on this document while she was at work and supposed to be working on Company business; and (3) the document was opened on her computer for nearly four hours on August 12, 2015. (Tr. 105-06, 210.)

The only question about what happened on August 12 is whether Ms. Johnston typed the document from scratch on that date or whether she only worked on editing it on that date. According to Ms. Johnston, she did not type it from scratch. Rather, her mother typed it and e-mailed it to her. Ms. Johnston took over from there and did editing while she was supposed to be working. (Tr. 106-07.)

A search of the Company's computer system showed that Ms. Johnston's mother, Laura Ball, routinely sent personal e-mails to Ms. Johnston on Ms. Johnston's Andronaco e-mail account. Respondent's Exhibit 11 is a list of those e-mails. (Tr. 214.) What the search also

showed was that there was no e-mail from Ms. Johnston's mother in August 2015 which contained an attachment. (Tr. 216.)

Ms. Johnston left open the possibility that her mother may have used Ms. Johnston's personal e-mail account. Of course, the question that arises is since Ms. Johnston's mother had so routinely used the Andronaco account why would she have used a personal e-mail account this time?

Ms. Hicks saw that Ms. Johnston was working on this letter at work, and this was the last straw:

> A. I mean I was very upset about it. I mean I'm extremely behind on all of my work. We had just given Lindsey extra time off without penalty for her wedding, and she had just come back, you know, less than a week ago, and she's spending all this time working on this letter, when I knew there was a ton of other work that needed to be done. I was very mad. I didn't say anything at the time because I was busy and I didn't know how to react. So I discussed what I found with Cheryl Sarver in HR.
>
> Q. Okay. Did you come to some conclusion?
>
> A. Yeah. We thought that this is grounds for termination.

(Tr. 149.)

Ms. Hicks and Ms. Sarver planned to terminate Ms. Johnston at the end of the day on Friday, August 14. However, earlier that Friday, Ms. Johnston asked for more time off. (Tr. 154.) She wanted to leave early. (Tr. 151.)

Since she made that request, Ms. Hicks and Ms. Sarver decided to meet with her earlier in the day to tell her she was terminated so that she could leave early. As General Counsel's Exhibit 11 shows, Ms. Hicks had come to understand that Ms. Johnston was trying to pass along information to Mr. Barrett. Thus, when the meeting started, that was the item that Ms. Hicks

addressed first. She had intended to get into the other performance issues, but Ms. Johnston became upset and starting crying so Ms. Hicks ended the meeting. (Tr. 153.)

B. <u>The Alleged Coercive Interrogation And Accusation Of Disloyalty</u>

These allegations are stated at paragraph 7 and 8 of the Complaint as follows:

> 7. About August 11, 2015, Respondent, by Rick Vining at its Kentwood facility, coercively interrogated its employees about their concerted activities and sympathies.
>
> 8. About August 14, 2015, Respondent, by Kaila Schweda at its Kentwood facility, accused the Charging Party of disloyalty toward Respondent because of her protected concerted activities.

Neither of these allegations was ever the subject of any unfair labor practice charge. The charge in this case was admitted as General Counsel's Exhibit 1(a). It states in its entirety as follows:

> On or about August 14, 2015, the Employer discharged me because of my association with former employee Nate Barrett, and the Employer's belief that he and other employees engaged in protected concerted activity for mutual aid and protection, and to discourage employees from engaging in those activities.
>
> At all times the Employer has maintained in its Employee handbook overly broad rules restricting employee Sec. 7 rights.

While there was never any charge filed about the allegations, the testimony was allowed over objection. Here is Ms. Johnston's testimony about what Mr. Vining asked about her and Mr. Barrett's discussion on or about August 11:

> Q. So what happened? How did Rick Vining talk to you about this?
>
> A. I was just sitting at the front desk, and he came up, knelt down, and he said, hey, have you talked to Nate? And I said, yes, I think he's doing okay. I don't know. And Rick said, he said, well, do you know about what's going on between him and the Company? And I said, yeah, Nate let me know something. I don't want to talk about it here. It's

> all over my head. I don't know what's going on. And I basically just -- that was it.

(Tr. 84-5.)

Here is how Ms. Johnston described her view of the conversation she had with Mr. Vining about Mr. Barrett:

> Q. Okay. And how many times do you think that he approached you and asked if you were still speaking with Mr. Barrett?
>
> A. Several. I didn't think anything of it because I thought he was concerned for Nate's well-being. And they had worked together, so I assumed, you know, they were friends, too.

(Tr. 81.)

Ms. Johnston's testimony with regard to the disloyalty comment was that when her employment was terminated, Ms. Hicks said to her "we can't trust your loyalty with the company." (Tr. 87.) General Counsel's Exhibit 11 are the notes Ms. Hicks took describing the content of the termination meeting. Those notes showed that Ms. Hicks told Ms. Johnston had lost the Company's trust and that they "didn't feel that she was loyal to the company." It goes on to say that the reason for the concern about loyalty was "we felt that she was acting as advocate for Nate and attempting to get information out of Rick Vining to pass along to Nate." And, of course, this was shortly after the Company had filed a lawsuit against Mr. Barrett.

C. The Handbook Provisions

Paragraph 11 of the Complaint alleges that certain provisions of the Company's handbook are unlawful. With regard to the allegations about the dress code and the internet and e-mail use policies, the General Counsel's issue is that they apparently prevent displaying, viewing or passing along information that is offensive. There was no evidence presented that any employee had ever been disciplined or discharged for violation of these policies. And, in

fact, Mr. Andronaco testified that the intent is only to prohibit things everyone would agree should be prohibited – racially abusive and pornographic material. Mr. Andronaco specifically testified that the policies were never intended to reach to things like a union website or legitimate political information. (Tr. 197).

III. ARGUMENT

A. The Discharge Of Ms. Johnston Was Not Unlawful

The specific allegation of the complaint is that Ms. Johnston was discharged because

> "about the months of May, June, and July 2015, Respondent's employee, the charging party, engaged in concerted activities with other employees for the purposes of mutual aid and protection by discussing the wages, hours, and working conditions of Respondent's employees."

[GC-1(c), ¶6.]

There was no evidence presented at the hearing to support the allegation that Ms. Johnston discussed wages, hours and working conditions with anyone in May of 2015, June of 2015, or in July of 2015. Indeed, there was not one piece of evidence presented at the hearing that Ms. Johnston had any such discussions with anyone at any time. This absolute failure of proof on the specific allegation of the Complaint by itself requires that the discharge claim be dismissed.

Apparently recognizing that there would be no proof to support this allegation, the General Counsel indicated at the trial that the theory would shift. The new theory is that Ms. Johnston was discharged because she associated with Mr. Barrett. This new theory is defective for several reasons. First, since there was no such allegation in the Complaint, the violation cannot be based upon it. Second, even with the Nathaniel Barrett connection, there was simply no protected concerted activity involved. Finally, what the evidence shows is that Ms. Johnston

was discharged because of performance issues that her supervisor, Kaila Hicks, began documenting a year before any issue arose with Mr. Barrett.

1. No Violation Can Be Predicated On This New Theory

Both the Administrative Procedures Act and the Board's own rules require that a complaint properly inform the charged party of any asserted violation. 5 USC § 544(b)(iii); 29 CFR § 102.15. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. *George Banta Co v NLRB*, 222 U.S. App DC 288, 686 F2d 10, 17 (DC Cir. 1982). For example, in *United Parcel Service, Inc. v NLRB*, 706 F2d 972 (3rd Cir. 1983), the court described the general legal requirements.

> Even where evidence supporting a remedial order is in the record, courts have refused to grant enforcement of a Board order in the absence of either a supporting allegation of a complaint, or a meaningful opportunity to litigate the underlying issue before the ALJ. See, e.g., *Blake,* 663 F2d at 279; *Montgomery Ward Co. v NLRB*, 385 F2d 760, 763-64 (8th Cir. 1967).

Id. at 978.

In this case, of course, there was no allegation in the Complaint that Ms. Johnston was discharged because she maintained a relationship with Mr. Barrett. Thus, there can be no finding of a violation based on that theory.

2. The Board's New Theory Is Fatally Deficient Because There Was Never Any Protected Concerted Activity And Because The Company's Focus With Regard To Mr. Barrett Was Entirely On The Potential That He Had Unauthorized Access To Confidential Data

Apparently, the General Counsel's new theory goes something like this: Mr. Barrett engaged in protected concerted activity when he had a conversation with Mr. Cascaden in May of 2015, and since Ms. Johnston was in contact with Mr. Barrett in August 2015, her discharge must have somehow been connected to the Cascaden/Barrett conversation. This game of leap

frog that the General Counsel asks the ALJ to play fails because Mr. Barrett never engaged in any protected concerted activity and because the undisputed evidence is that the Company's entire focus with regard to Mr. Barrett was the concern that he had unauthorized access to its computer system, not because of the substance of his conversation with Mr. Cascaden.

As Mr. Barrett described it, the discussion he had with Mr. Cascaden about wage rates on May 28, 2015, fell into the category of mere gossip, not protected concerted activity. Illustrating this is *Ellison Media Company*, 2004 NLRB LEXIS 605 (2004). In that case, an employee had sent an e-mail to another employee describing an altercation he had with his supervisor. The General Counsel argued that the e-mail constituted protected concerted activity. The ALJ held that the e-mail did not constitute protected concerted activity:

> For communications between employees to be found to be protected concerted activity, they must look toward group action. The e-mail does not meet that standard. See *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683 (3rd Cir. 1964); *Alex R. Thomas & Co.,* 333 NLRB 153 (2001).

(*Id.*)

Mr. Barrett's own testimony shows the conversation he had clearly did not "look toward group action." He and Mr. Cascaden were at most gossiping around the "water cooler."

Mr. Andronaco's testimony, which Mr. Barrett confirmed, was that the thing that caused him worry was that Mr. Barrett or someone else may have had the administrative password and, thus, the ability to access the Company's system which contained all sorts of highly confidential information. Of course, an employer does not violate the law by taking action against employees when it believes they are misusing such confidential information. *See, e.g., Flex Frac Logistics, LLC*, 360 NLRB 120 (2014).

Even if the Complaint had properly pled that Ms. Johnston was discharged because of her association with Mr. Barrett, since Mr. Barrett did not engage in protected concerted activity, and

because the Company had every right to take the action that it did to protect its confidential information, the association theory would still be deficient. Illustrating this is *Joseph Schlitz Brewing Co.*, 211 NLRB 799 (1974). In that case, the alleged discriminitee was an office clerical employee. She worked at a facility where employees were represented by the Steelworkers union. Her husband was a member of that union, but worked at a different location. The alleged discriminitee and her husband were social friends with the Vice-President of the Steelworkers union. She was discharged admittedly because the Company was concerned that because of these relationships, she might disclose confidential labor relations information. The Administrative Law Judge found the discharge to be a violation, the Board reversed stating:

> In our view, Respondent's discharge of Sharon Pollard was motivated by its legitimate desire to protect the confidentiality of its labor relations matters from disclosure to others. Mrs. Pollard gave Respondent ample reason to question her suitability for her job. Her inquisitive actions included the screening of telephone calls to the industrial relations manager's office and her questioning of that manager's secretary concerning the reason for an employee's meeting in the manager's office and whether the employee was being terminated. These actions, not surprisingly, led Respondent to suspect that she was trying to obtain confidential information improperly for the purpose of transmitting it to others. In these circumstances, we would not find her discharge to be a violation of Section 8(a)(3) of the Act and, accordingly, we would dismiss the complaint.

(*Id.*)

The General Counsel's new "association" theory runs straight into the *Schlitz* case. Mr. Barrett did not engage in any protected activity. Even if her association with Mr. Barrett had been the motivating factor, that would not be unlawful. The Company would be entitled to take such action to protect its position in the lawsuit.

3. Ms. Johnston's Discharge Was Not Because Of Her Association With Mr. Barrett

Ms. Johnston was not discharged because of her association with Mr. Barrett. She was discharged because of her performance problems:

- Poor attendance spanning the last year of her employment. She was always in a negative point situation.
- Poor marks on her performance review due to her failure to take on responsibility and to maintain acceptable attendance.
- Routine failure to clock in and out as required.
- Gaming the system by punching in before she even parked her car in order to avoid a tardy mark.
- Spending lengthy periods of time entertaining visitors in the Company's lobby while she was supposed to be working on two occasions.
- Typing (or editing) the long letter about her bridesmaids dresses during work time.

The General Counsel will likely point to two items and argue that this lengthy list of performance issues was not the motivation for Ms. Johnston's termination. Those two items are General Counsel's Exhibit 11 and the fact that in May of 2015, Ms. Johnston received a raise.

With regard to General Counsel's Exhibit 11 the undisputed testimony is that that was not a document intended to itemize the reasons for Ms. Johnston's termination, it was a document created to memorialize the discussion that occurred at her termination meeting. (Tr. 162.) Remember, Ms. Hicks testified that at that meeting she had intended to address not only what she had learned about the contact with Mr. Barrett, but also the other performance issues detailed above. However, before she got to those other issues, Ms. Johnston became very emotional and

started crying so Ms. Hicks decided to end the meeting. In fact, Ms. Johnston herself confirms that just before the meeting ended Ms. Sarver started to mention performance issues. (Tr. 87.) Thus, GC-11 is not documentation of the reasons for Ms. Johnston's discharge, instead it was only a memorialization of the actual discussion that took place at the meeting, a meeting that was cut short.

With regard to the raise, it was Mr. Andronaco who gave Ms. Johnston the raise. Ms. Hicks was never in favor of it, and told Mr. Andronaco she opposed it. (Tr. 163.) However, it was Ms. Hicks who made the decision to terminate Ms. Johnston, not Mr. Andronaco. Of course, the raise was given before the more significant performance issues occurred – entertaining the two visitors in the lobby, and spending the day writing the letter about the bridesmaids' dresses. Indeed, the document that most accurately states the reason for Ms. Johnston's discharge was the handwritten log that Ms. Hicks started keeping beginning in January 2015, Respondent's Exhibit 6.

B. <u>The Alleged Coercive Interrogation And The Accusation of Disloyalty Should Be Dismissed</u>

First, because there was never any unfair labor practice charge making allegations about coercive interrogation or accusations of disloyalty, those allegations should have never been made part of the Complaint and ought to be dismissed on that basis. In *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927 (1989), the Board addressed the question of when an allegation not included in the charge could make its way into a complaint. The Board held that allegations are not properly put in a Complaint unless they are at least "closely related" to the allegation of the charge. To be closely related, they must arise from the same factual circumstances and be subject to the same defenses. (*Id.* at 928.) These allegations of the Complaint in this case are

entirely a different type than were contained in the charge, and the substantive defenses are entirely different.

Even so the alleged interrogation here does not come close to meeting the standard required for a violation. To be illegal, the questions Ms. Johnston allege that Mr. Vining asked her about Mr. Barrett would have to be such that from her standpoint, there would be a reasonable tendency to interfere with, restrain, or coerce her in the exercise of her protected rights. *America Freightways Co.*, 124 NLRB 146, 147 (1959); *Double D Construction Group, Inc.*, 339 NLRB 303 (2003). Ms. Johnston's own testimony shows that there was no such coerciveness attached to the alleged questions. According to Ms. Johnston, she understood that Mr. Vining was just asking about the well-being their mutual friend, Mr. Barrett.

Similarly, Ms. Hicks' referenced to loyalty during the termination meeting does not constitute any violation. It is obviously not an automatic unfair labor practice to question an employee's loyalty. It is only when the accusation of disloyalty is due to some protected activity that a violation occurs. *Ferguson-Williams, Inc.*, 322 NLRB 695, 699 (1996). Here, Ms. Hicks' reference to disloyalty was not in connection with any protected activity of Ms. Johnston. It was made in response to her suspicion that Ms. Johnston was looking to assist Mr. Barrett against the Company with regard to the lawsuit (GC-11).

C. The Handbook Provisions Are Not Unlawful

Apparently the Board's quarrel with the Company's handbook is that it prohibits offensive displays and communications. In *Fiesta Hotel Corp*, 344 NLRB 1363 (2005), the ALJ had found that a rule prohibiting "any type of conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow team members or patrons" was unlawful. The Board disagreed and held that without evidence that the rule had "touched on, had been applied to, or intended to apply to situations involving Section 7 activity,"

and would not be held unlawful. Similarly, in *Valley Health Systems, LLC*, 215 NLRB LEXIS 181, the Administrative Law Judge held that a rule that prohibited "offensive conduct" did not violate the Act.

Here, the Company's rules have never been applied to discipline anyone for engaging in Section 7 activity. There is no evidence that they were promulgated in response to Section 7 activity or intended to impinge on Section 7 activity. In fact, the undisputed evidence is that the rules are intended to reach solely the kind of display or communication that is almost universally found offensive – pornographic or racially abusive subjects. Accordingly, the handbook provisions should not be found unlawful.

IV. CONCLUSION

For the reasons stated herein, Respondent requests that the Complaint be dismissed in its entirety.

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Dated: April 7, 2016

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